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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 660

HENRIK MANNERFRID,

Petitioner,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia sustaining a deportation order against petitioner.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 23 of the Appendix herein. The opinion of the Court of Appeals is not yet reported and is set forth at page 25 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on October 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the denial of argument or permission to file briefs at a quasi-judicial hearing in deportation proceedings which the District Court found "occasioned less than a full hearing" and therefore less than full due process is sanctioned by *Marcello* v. *Bonds*, 349 U.S. 302, or cured "in the light of a full hearing before the Board of Immigration Appeals" which sits purely in an appellate capacity.

2. Whether the Government's concession accepted by the Court in prior naturalization proceedings and the further unrevoked concession in the present proceeding that petitioner had been legally admitted for permanent residence in 1949, may be disregarded, and a contrary finding made to sustain a deportation order.

3. Whether petitioner's reliance to his detriment upon an order of the Attorney General acting within the scope of his authority in a matter upon which his decision is final estops the government on equitable principles from deporting petitioner.

4. Whether a specific finding that petitioner had lawfully entered the United States in 1949, made in a naturalization proceeding is *res judicata* against the Government in a later deportation proceeding.

5. Whether the doctrine of administrative *res judicata* applies to the more than thirteen determinations herein that petitioner lawfully entered the United States in 1949.

Statutes and Regulations

The pertinent statutes and regulations are set forth in the Appendix herein at pages 19 to 23.

Statement of Facts

Petitioner, Mannerfrid, a native and citizen of Sweden, entered the United States as a temporary business visitor on June 4, 1941, under §(3)(2) of the Immigration Act of 1924 (8 U.S.C. 203(2)) (R. 18-19). He was forced to remain in this country after having been placed on the Nazi blacklist and having been denied safe conduct permission to return to Sweden.

On March 16, 1943, while still a temporary visitor, Mannerfrid executed DSS Form 301 (Application by Alien for Relief from Military Service) (R. 39-41).[1]

Thereafter petitioner's stay in the United States was extended from time to time until 1948, when an application for pre-examination [2] was presented to the Attorney General. All the relevant facts concerning petitioner's background and previous actions which are known to the Attorney General today were known to him then and were in the record before him. After a review of the facts the Attorney General entered an order authorizing pre-examination and specifically found:

> "Upon the unique and specific facts as set forth in the file in this case, it is found that the alien is not ineligible to citizenship or admission for permanent residence for having filed DSS 301 under mistake . . ." (R. 42)

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[1] Accompanying this application Mannerfrid wrote a letter to his draft board stating among other things that he was executing DSS Form 301 because he had been informed by the Swedish Consul that he would lose his Swedish citizenship if he served in the American Armed Forces (R. 35). It is undisputed that the advice of the Swedish Consul was erroneous.

[2] 8 C.F.R. 142.2 (1949 Edition). Preexamination authorized an alien to proceed to Canada for a permanent visa to reenter the United States. Only consuls abroad can issue visas. Preexamination is only authorized where it is found that an alien is eligible to enter the United States for permanent residence.

Following pre-examination, Mannerfrid went to Canada and, after the American Consul there had satisfied himself that he was admissible to the United States, secured a visa to enter the United States as a permanent resident. The Immigration authorities, concurring in that determination, admitted Mannerfrid to the United States for permanent residence on April 5, 1949 (R. 1). Four days later, on April 9, 1949, and in reliance upon his newly acquired status Mannerfrid married an American citizen (R. 19). Mrs. Mannerfrid has never resided in Sweden and does not speak Swedish.

On April 17, 1951, Mannerfrid applied for naturalization (R. 18-22). The Designated Examiner (R. 31, 38) and the Commissioner of the Immigration and Naturalization Service (R. 38) found that petitioner was admitted to the United States for permanent residence on April 5, 1949.[3] The District Court of the Southern District of New York (R. 43, 44) and the Court of Appeals for the Second Circuit (R. 48) affirmed the legality of petitioner's lawful entry in 1949, but denied him citizenship upon the ground that he claimed draft exemption as a neutral alien under 50 U.S.C. App. 303(a). (101 F. Supp. 446; 200 F. 2d 730; cert. denied 345 U.S. 918).

Between 1949 and 1953 Mannerfrid was issued thirteen rentry permits and permitted to enter the United States with these reentry permits on thirteen occasions during this period. (R. 3).

At the inception of the deportation hearing, the examining officer (counsel for the Government) requested Mannerfrid's counsel to concede that Mannerfrid:

> "was granted the privilege of pre-examination, departed from the United States, *and lawfully reentered*

[3] Indeed the Commissioner of Immigration and Naturalization, recommended that Mannerfrid's petition for naturalization be granted.

> *this country* at Niagara Falls, New York April 5, 1949 in possession of Immigration visa No. 561 . . ." (Italics added.)

A stipulation to this effect was orally agreed upon (Immigration File, pp. 8-9).

In the deportation proceedings Mannerfrid's counsel was not permitted to argue the case or submit a brief prior to the hearing officer's decision herein. (Immigration File, p. 19).

A final order of deportation was subsequently entered by the Board of Immigration Appeals, and this declaratory judgment action followed.

The Government in its answer admitted that Mannerfrid had been admitted for permanent residence in April of 1949; that he thereafter on about thirteen occasions had been issued reentry permits and that he had been permitted to reenter the United States for permanent residence on the basis of these reentry permits (R. 3).

In the District Court the opposing parties cross moved for summary judgment. The government's motion was granted in an opinion (Appendix, p. 24) by the District Judge who stated:

> "While the inequities of this case are patent, the law as it now stands affords no relief. The federal courts which presided over the naturalization hearings acknowledged, recited, and assumed for purposes of the case, that plaintiff had been lawfully admitted for permanent residence in 1949. They were not advised to the contrary by the Government. Yet a redetermination of plaintiff's 1949 admission cannot be held to be foreclosed to the Government under the doctrine of judicial *res judicata*. A determination was not essential to the actual decision made.

"The denial of argument before the special inquiry officer of the Immigration Service and his failure to consider counsel's brief prior to rendering his decision occasioned less than a full hearing, but in view of *Marcello* v. *Bonds*, 349 U.S. 302 (1955), and 8 U.S.C. 1252 (b), and in light of the full hearing before the Board of Immigration Appeals we cannot hold that due process was denied.

"With considerable reluctance we are forced to conclude that summary judgment be granted defendant."

The Court of Appeals affirmed upon the basis of the District Court opinion (R. 52).

Reasons for Granting the Writ

1. The decisions below are in conflict with *Sung* v. *McGrath*, 339 U.S. 33 (1950) as well as *Morgan* v. *United States*, 298 U.S. 480, 481 (1936), and misinterpret *Marcello* v. *Bonds*, 349 U.S. 302 (1955).

The District Court found that something less than a full hearing was granted petitioner before the special inquiry officer. The Board of Immigration Appeals, as does any appellate tribunal, gives full weight to the conclusions of fact and law reached below. An appellate argument before the Board of Immigration Appeals cannot undo the original deprivation of due process which occurred before the hearing officer.

Mr. Justice Brandeis observed that: "In the development of our liberty insistence upon procedural regularity has been a large factor." (*Burdeau* v. *McDowell*, 256 U.S. 465, 477 (1921)).

Under the immigration statute and regulations (8 U.S.C. 1252-b-1; 8 C.F.R. 242, 53g) specific provision is made for representation of the alien by counsel before the hearing

officer. Representation by counsel necessarily includes the right to present a brief. If counsel may be silenced from written representation at this stage of the proceeding, where is the line to be drawn? May he be precluded from cross-examination or silenced entirely? Appellate due process before the Board of Immigration Appeals can no more take the place of due process at the initial hearing level than appellate argument before this Court can be substituted for due process in the trial court.

The hearing contemplated by the immigration law and regulations is a fair and impartial one. In administrative hearings the liberty of individuals should be "protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . . Such a hearing has been described as an 'inexorable safeguard.'" (*Morgan* v. *United States*, 304 U.S. 1, 14, 15 (1938). And in this connection, it should be observed that the "fact that a judgment may be justified on the merits does not obviate the requirements of a fair hearing." *National Labor Relations Board* v. *Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C.A. 7, 1952); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F. 2d 147, 149 (C.A. 8, 1939); *Sung* v. *McGrath*, 339, U.S. 33 (1950).

In *Sung* v. *McGrath, supra*, the alien was denied procedural due process through failure to comply with the Administrative Procedure Act before the hearing officer. He too had a full oral argument before the Board of Immigration Appeals. Nevertheless, the denial of due process before the hearing officer resulted in the quashing of a deportation order.

In addition, it should be noted that the hearing officer has the responsibility of conducting a fair and impartial hearing and that his findings are binding upon the Board which

only acts in an appellate capacity.[4] *U.S. ex rel. Brzovich* v. *Holton*, 222 F. 2d 840 (C.A. 7, 1955); *Yee* v. *Barber*, 225 F. 2d 707 (C.A. 9, 1955).

It is perfectly clear that in deportation proceedings an alien is entitled to a due process hearing, *Sung* v. *McGrath*, *supra*; *Japanese Immigrant Case*, 189 U.S. 86, and a hearing includes argument which here was, denied.

In *Morgan* v. *United States*, 298 U.S. 480, 481 (1935), the Court said:

> "The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Here the petitioner had a hearing before a special inquiry officer but no opportunity to argue his case. In part, he was therefore deprived of counsel. See *Handlovits* v. *Adcock*, 80 F. Supp. 425 (D.C. Mich. 1948).

Nor does *Marcello* v. *Bonds*, *supra*, sanction something less than due process at all stages of the deportation process. Nothing in that case remotely supports the decisions below. Reliance upon that case as a curative for the clear deprivation of due process in the case at bar is we suggest, wholly in error. The failure to permit argument by counsel before rendition of decision was a deprivation of due process rendering the hearing void.

The issue presented is not only of widespread importance in deportation hearings, but also in the entire field of ad-

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[4] *Opp. Cotton Mills* v. *Administrator*, 312 U.S. 126, 152 (1941), is distinguishable. There the so-called appellate tribunal rather than the original administrative body conducted the quasi-judicial hearing. The latter was merely an investigating agency limited to the making of recommendations.

ministrative law. Representation by counsel is vital at all stages to the proper presentation of cases before specialized administrative agencies. This Court has never sanctioned something less than fair and full administrative hearings with less than full representation by counsel.

2. In *United States* v. *Coast Wineries*, 131 F. 2d 643, 650 (C.A. 9, 1942), the Court stated:

> "If the contention of appellant (the Government) is upheld, no trial court can accept a statement or stipulation of a Government attorney during the progress of a trial, which must obviously result in delay and confusion, which would be seriously detrimental to the orderly administration of justice."

The Government's concessions that petitioner had "lawfully" entered the United States in 1949 were made both in the prior naturalization case and in the case at bar. (R. 23, 31, 35, Immigration File pp. 8-9).

If these concessions do not bind the Government, then no statement of government counsel in the course of litigation can be accepted by the courts without suspicion that it will be ignored or withdrawn whenever the Government's convenience requires. In view of the conflict below with decisions of the Ninth Circuit on this issue and in view of the importance of the issue herein to the orderly administration of justice, review by this Court should be entertained.

3. The courts below have rejected petitioner's argument that the Government is estopped on equitable principles from deporting him. Reliance was placed upon the hoary saw that "no . . . estoppel can be asserted as a defense against the sovereignty of the United States." (J.A. 13). We respectfully submit that compelling authority to the contrary, requires interdiction of the Government's proposed unconscionable action.

The genesis of the doctrine of equitable estoppel and the circumstances under which it will be applied against the Government are fully set forth with copious citation of authority in the recent case of *United States* v. *Certain Parcels of Land*, 131 F. Supp. 65 (D.C. S.D. Calif. 1955). The Court in that case rendered a caveat equally applicable in the case at bar:

> "With these principles in mind consideration is turned to the familiar dictum that 'there can be no estoppel against the government or its agencies.' * * * Like all generalizations, this one too is apt to mislead if one fails to remember that: 'general propositions do not decide concrete cases.' "

The prerequisite for bringing into play the doctrine of equitable estoppel against the Government follow:

(a). that the person acting on behalf of the Government acted within the scope of his authority;

(b). that the act be performed with full knowledge of the facts and with full consciousness of the problem involved, and

(c). that there be a relience upon the act. *Vestal* v. *Commissioner of Internal Revenue*, 152 F. 2d, 132 (C.A. D.C. 1945).

All the prerequisites for activating the rule of equitable estoppel, are here present.

(a). Clearly, the Attorney General acted within the scope of his authority in determining and ruling that Mannerfrid was not ineligible for admission. The Attorney General was fully empowered by law to determine whether an alien is admissible for permanent residence. To that end, he was authorized to make all requisite subsidiary determinations. He could not, of course, by his action bind the

Naturalization courts on a matter of citizenship. But he can bind the Executive Branch of the Government on the issue of admissibility. That was precisely the area of responsibility which the Congress had reserved to him. It was in that area that he made his binding determination.

(b). The Attorney General was in full possession of all pertinent facts concerning Mannerfrid's eligibility for immigration. This has never been disputed by the Government. Moreover the Attorney General was "fully conscious of the problem involved."

(c). Mannerfrid obviously can never be restored to the position he held prior to his reliance upon the Attorney General's determination and ruling. Deportation would force him to give up his home. It would destroy his business. It would disgrace him in the eyes of his friends. It would require his wife to accompany him to his native land, where she has no ties of any sort and where the language and customs are entirely foreign to her. Deportation, in short, would be an utterly catastrophic event in the life of an innocent man.

In far less compelling circumstances, this Court and inferior courts have invoked the doctrine of equitable estoppel against the Government.

Thus, the doctrine has been applied against the Government in land cases:

Lindsey v. *Hawes*, 67 U.S. 560 (1863)

United States v. *Big Bend Transit Co.*, 42 F. Supp. 469 (D.C. Wash. 1941)

United States v. *Brabham*, 122 F. Supp. 570 (D.C. S.C. 1954)

United States v. *Property on Pinto Island*, 74 F. Supp. 92 (D.C. Ala. 1947)

United States v. *Stinson*, 125 F. 907 aff'd, 197 U.S. 20 (7th Cir., 1903)

United States v. *Willamette Val. & V. M. Wagon-Road Co.*, 54 F. 807 (C.C. Ore. 1892)

In contract cases:

United States v. *Jones*, 176 F. 2d 278 (9th Cir., 1949)

Walker v. *U. S.*, 139 F. 409 (C.C.M.D. Ala. 1905)

Branch Banking & Trust Co. v. *U. S.*, 98 F. Supp. 757 (Ct. of Claims, 1951)

Dayton Airplane Co. v. *U. S.*, 21 F. 2d 673 (6th Cir., 1927)

J. Homer Fritch, Inc. v. *U. S.*, 236 F. 133 (9th Cir., 1916)

In tax cases:

Smale & Robinson, Inc. v. *U.S.*, 123 F. Supp. 457 (D.C. S.D. Cal. 1954)

United States v. *Brown*, 86 F. 2d 708 (6th Cir., 1936)

Stockstrom v. *Commissioner of Internal Revenue*, 190 F. 2d 283 (C.A. D.C. 1951)

In deportation cases:

Ex parte Kazan, 5 Fed. 2d 243 (D.C. Tex., 1925)

Podea v. *Acheson*, 179 F.2d 306 (2nd Cir., 1950)

Gay v. *Brownell*, 120 F. Supp. 319 (D.C.P.R., 1954)

U.S. ex rel Hadrosek v. *Shaughnessy*, 101 F. Supp. 432 (D.C.S.D.N.Y. 1951)

The foregoing does not purport to be an exhaustive list of cases where the Government has been held estopped from pursuing an unconscionable course of conduct. Suffice it to say that the courts have held the Government to a course of fair dealing. Where it has sought to pursue any other course, it has been estopped.

Where as here the Government seeks to perpetrate a grievous wrong, the Court will stay its hand on general equitable principles quite apart from the doctrine of estop-

pel. In *Stockstrom* v. *Commissioner of Internal Revenue*, 190 F. 2d 283 (C.A. D.C. 1951) the Court declined to permit the Government to assess a tax because it would have been "unconscionable." In *Moser* v. *U.S.*, 341 U.S. 41 (1951), this Court held that "elementary fairness" require that petitioner be permitted to become a citizen despite the Government's contention that he had waived his right by claiming draft exemption.[5]

The *Moser* case involved a naturalization proceeding, whereas the instant case involves deportation, but it can hardly be said that principles of "elementary fairness" are less applicable in the latter type of proceeding. If anything, those principles should be applied with greater liberality in a deportation case since "deportation" may result also in loss of both property and life, or all that makes life worth living. *Ng. Fung Ho.* v. *White*, 259 U.S. 276 (1922). See also *Wong Yung Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).

4. From the days of *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876), to the present [*Lawlor* v. *National Screen Service*, 349 U.S. 322, 326 (1954)], this Court has applied the doctrine of res judicata or, more accurately, that of collateral estoppel to preclude "relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor* v. *National Screen Service, supra.* The Court below, however, departed from such doctrine upon the ground that a concession of an issue in a prior suit prevents "actual litigation," and therefore collateral estoppel is inapplicable.

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[5] It is worthy of note that Judge Hand in his opinion for the Second Circuit in the naturalization case said:

"We concede that there would be no more than a further step of the lenity that the Court exercised in *Moser* v. *United States*, *supra*, and that the difference is one of degree. . . ."

At the time petitioner, Mannerfrid, filed his petition for naturalization in 1951, § 707 of Title 8 U.S.C. provided that:

> "(a) no person * * * shall be naturalized unless * * * petitioner (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least 5 years * * * "

As a person married to an American citizen, Mannerfrid's period of required lawful residence was only two years. (8 U.S.C. 711(b)). Under the applicable regulations, moreover, Mannerfrid was not eligible for naturalization unless he shall:

> "Have been lawfully admitted to the United States for permanent residence." 8 C.F.R. 322 (1949 Edition).

Finally in order to have his application for naturalization processed or even presented to the Naturalization Court, it was necessary that the petitioner present a *certificate of arrival* showing "the date, place and manner of arrival and whether lawful entry for permanent residence was made." (8 C.F.R. 363.1, 3; 1949 Edition). The certificate of arrival is "the natural starting point" of the naturalization process. *United States* v. *Ness*, 245 U.S. 319 (1917).

It is obvious from the foregoing that a prerequisite for the court's assumption of jurisdiction over the naturalization proceeding was the determination that Mannerfrid had lawfully been admitted for permanent residence. *United States* v. *Ness*, 245 U.S. 319 (1917); *Knauff* v. *Shaughnessy*, 179 F. 2d 628 (1950). This matter was put in issue by Mannerfrid's averments in his petition for naturalization (R. 19). They were not disputed by the Government. They were accepted as accurate by the Designated Naturalization

Examiner (R. 31), the Commissioner of Immigration (R. 35) and Government Counsel (R. 23). Indeed, in view of the outstanding determination and ruling by the Attorney General on that issue, those averments could not have been disputed. The Naturalization Court, therefore, necessarily found and, indeed, stated that Mannerfrid had lawfully immigrated (R. 43).

Nevertheless, the Court below declined to accept the prior determination of lawful residence as binding. The District Court below declared (R. 13):

> "While the inequities of this case are patent, the law as it now stands provides no relief. The federal courts which presided over the naturalization hearings *acknowledged, recited and assumed* for purposes of the case, that plaintiff had been lawfully admitted for permanent residence in 1949. They were not advised to the contrary by the government. Yet a redetermination of plaintiff's 1949 admission cannot be held to have been foreclosed to the government under the doctrine of judicial *res judicata*. Lawful admission was not actually litigated. A determination was not essential to the actual decision made."

Since lawful admission is an essential prerequisite to every naturalization case, the fact that the issue is conceded rather than litigated does not preclude the application of *res judicata* or collateral estoppel. If it did, no default judgment or judgment by confession would be binding.

> "It can make no difference in principle, whether facts upon which the court proceeded were approved by deed *or witnesses or whether they were admitted by the parties.*"
>
> *Bissell* v. *Spring Valley Township*, 124 U.S. 225, 234 (1888).

See also: *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).

In view of the important public considerations which call for a terminal point in litigation (*United States* v. *Munsingwear*, 340 U.S. 36, 1950), in view of the misconception by the Court below that actual litigation and not mere concessions can only result in a preclusion of relitigation, in view of the settled doctrine that lawful admission is the first prerequisite to naturalization, and in view of the conflict on these points with decisions of this Court, we submit that certiorari should be granted.

5. After petitioner, Mannerfrid, entered the United States in 1949, he sought and received thirteen reentry permits. These thirteen issuances of reentry permits were adjudications by the respondent that Mannerfrid was here legally and had entered legally in 1949. With each reentry permit Mannerfrid reentered the United States and was admitted thirteen times again as a legal resident—thirteen additional adjudications that he was entitled to permanent residence. Now the Government seeks cavalierly to say that the thirteen reentry permits followed by the thirteen readmissions of Mannerfrid for permanent residence were mistakes.

In *Davis on Administrative Law* (1951) p. 612, it is said:

> "The common-law doctrine of res judicata, including the subsidiary doctrine of collateral estoppel, is designed to prevent the relitigation by the same parties of the same claims or issues. The doctrine applies to the administrative process whenever the circumstances are substantially similar to those of ordinary litigation in court. . . ."
>
> "Res judicata prevents an agency from prosecuting a second time for the same act or acts. . . ."

In *American Air Transport Inc.* v. *Civil Aeronautics Board*, 92 U.S. App. D.C. 307, 186 F. 2d 529 (C.A.D.C. 1953), the Court stated:

> "We recognize that there may be circumstances under which the application of the common law doctrine of *res judicata* to administrative determinations may be relaxed. But here our attention has not been drawn to any such circumstances."

Similarly in the instant case, no reason is shown why administrative *res judicata* should not be applied. On the contrary, in view of the many concessions judicially and administratively by the Government that Mannerfrid is a legal resident, compelling circumstances exist for a reaffirmation of his lawful residence. We submit that this Court should determine whether public policy against relitigation should not also apply to administrative determinations as well as to the judicial rulings herein.

Conclusion

1. The decision below is in conflict with decisions of this Court and other circuits.

2. The decision below has sanctioned a denial of due process in deportation cases never before permitted by this Court.

3. The decision below has refused to estop the Government on equitable principles from deporting petitioner whose sole offense has been to rely on the determination of the Attorney General that he was legally admissible to the United States in 1949.

4. The decision below has limited the doctrine of judicial and administrative *res judicata* in the face of overwhelming authority to the contrary.

These issues warrant review by this Court. We respectfully request that a writ of certiorari issue to review the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutes and Regulations Involved

Section 13 of the Immigration Act of May 26, 1924 (43 Stat. 161-162; 50 Stat. 165; 46 Stat. 581; 8 U.S.C. 213) provides as follows:

"(a) *Persons not to be admitted.* No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a nonquota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified in the visa in the immigration visa as such; and (5) is otherwise admissible under the immigration laws."

* * * * * * *

"(c) *Aliens ineligible to citizenship.* No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant under the provisions of subdivision (b), (d), or (e) of section 204 of this title, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, (3) is not an immigrant as defined in section 203 of this title, or (4) is the Chinese wife of an American citizen who was married prior to May 26, 1924.

(d) *Aliens inadmissible under clauses 2 and 3 of subdivision (a) of this section.* The Attorney General may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, is satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the

case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission."

* * * * * * *

Section 28(c) of the Immigration Act of May 26, 1924 (43 Stat. 168, 253; 47 Stat. 158; 59 Stat. 551; 8 U.S.C. 224 (c)) provides as follows:

"(c) The term 'ineligible to citizenship,' when used in reference to any individual who is debarred from becoming a citizen of the United States under section 303 or 306 of the Nationality Act of 1940, as amended (54 Stat. 1140, 1141; U.S.C., title 8, secs. 703, 706), or section 3(a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845; U.S.C., title 50, App. Supp. III), section 303(a), or under any law amendatory or supplementary to, or in substitution for, any such sections."

Section 3 of the Immigration Act of 1917 (39 Stat. 875-878; 8 U.S.C. 136-p) provided in part:

"That the following classes of aliens shall be excluded from admission into the United States: * * *
Provided further, that aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General and under such conditions as he may prescribe."

Section 307(a) of the Nationality Act of 1940 (54 Stat. 1142; 8 U.S.C. 707 (a)) provides as follows:

"(a) No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of

the petition up to the time of admission to citizenship and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Section 311 of the Nationality Act of 1940 (54 Stat. 1145; 8 U.S.C. 711) provides as follows:

"A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States, or whose spouse is naturalized after the effective date of this section, if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions:

"(a) No declaration of intention shall be required.

"(b) The petitioner shall have resided continuously in the United States for at least two years immediately preceding the filing of the petition in lieu of the five-year period of residence within the United States and the six months' period of residence within the State where the naturalization court is held."

Section 329(b) of the Nationality Act of 1940 (54 Stat. 1152; 8 U.S.C. 729(b)); provides as follows:

"(m) No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person's lawful entry for permanent residence shall have been established, and a certificate showing the date, place, and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner or a Deputy Commissioner to cause to be issued such certificate."

Section 242 (b) of the Immigration and Nationality Act of 1952 (66 Stat. 209, 8 USC 1252-(b) provides in part:

> "Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—
>
> (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceeding, as he shall choose; * * *"

8 Code of Federal Regulations 142.2 (1949 Edition) provided in part:

> "Preexamination shall not be authorized unless it appears to the officer granting such authorization that the alien is:
>
> * * * * * * *
>
> (d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence."

8 Code of Federal Regulations 322 (1949 Edition) provides as follows:

> "1. *General requirements.* A person, not a citizen of the United States, in order to be eligible for naturalization upon a petition for naturalization to a naturalization court shall, unless specifically exempted as set forth in this subchapter:
>
> * * * * * * *
>
> "(b) Have been lawfully admitted to the United States for permanent residence."
>
> * * * * * * *

8 Code of Federal Regulations 363.1 (1949 Edition) provides as follows:

> "*Official form of certificate of arrival; contents; by whom issued.* The certificate of arrival required by

the Nationality Act of 1940 shall be issued only by the Immigration and Naturalization Service, and shall show the date, place, and manner of arrival and whether lawful entry for permanent residence was made, as shown by the record of arrival. Such certificates of arrival shall be issued only on Form N-210, N-215, N-220, N-225, or N-230, whichever is applicable."

8 Code of Federal Regulations 363.3 (1949 Edition) provides as follows:

"*Certificate of arrival to be filed with petition for naturalization.* Each petitioner for naturalization who entered the United States after June 29, 1906, shall, unless specifically exempted by the Nationality Act of 1940 from the requirement of a certificate of arrival, file with his petition for naturalization a certificate of arrival issued in accordance with § 363.1. Such certificate of arrival issued to support a declaration of intention in accordance with § 363.2, may be used in support of the petition for naturalization.

Decision of the District Court

MEMORANDUM

(Filed January 30, 1956)

This cause came on to be heard on cross-motions for summary judgment.

Plaintiff is a native and citizen of Sweden who first came to the United States as a temporary business visitor on June 4, 1941. Extensions of his temporary stay were granted until 1947.

On March 16, 1943, plaintiff claimed draft exemption as a neutral alien. Deportation proceedings were instituted in 1948, after which plaintiff departed to Canada, secured an immigration visa, and reentered the United States on April 5, 1949. Thereafter he left and reentered the United States on eleven occasions with reentry permits, prior to his last entry on July 5, 1952.

On April 17, 1951, plaintiff filed a petition for naturalization. This was denied on the ground that he was ineligible to citizenship having once claimed draft exemption under Form DSS 301. See 101 F. Supp. 446, 200 F. 2d 730, 345 U. S. 918.

In 1953 the Immigration Service instituted deportation proceedings against him upon the theory that he was ineligible to receive a visa in 1949 in that he was ineligible to citizenship and that his entry in 1949 and all his subsequent reentries were actually illegal. A final order of deportation was entered by the Board of Immigration Appeals on September 3, 1954.

8 U.S.C. 1251(a)(1) provides that "any alien in the United States shall, upon the order of the Attorney General, be deported who—1 at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." The law at the time of plaintiff's 1949 entry was that no alien ineligible to citizenship shall be admitted to the United States unless he fell within certain exceptions which are not applicable here. See 8 U.S.C. 213(c).

While the inequities in this case are patent, the law as it now stands provides no relief. The federal courts which presided over the naturalization hearings acknowledged, recited, and assumed for purposes of the case, that plaintiff had been lawfully admitted for permanent residence in 1949. They were not advised to the contrary by the government. Yet a redetermination of plaintiff's 1949 admission cannot be held to have been foreclosed to the government under the doctrine of judicial *res judicata*. Lawful admission was not actually litigated. A determination was not essential to the actual decision made. *Res judicata* of this issue would have obtained had the court held plaintiff eligible for citizenship for a prerequisite to such finding would have been lawful admission for permanent residence.

The doctrines of administrative *res judicata* or the law of the case afford plaintiff no relief. In contemplation of law, if plaintiff was not entitled to be admitted legally in 1949, no law of the case or estopped can be asserted as a defense against the sovereignty of the United States. It cannot

properly be said that plaintiff acquired a technical right to remain in the United States, regardless of the equities attaching to his particular case.

The denial of argument before the special inquiry officer of the Immigration Service and his failure to consider counsel's brief prior to rendering his decision occasioned less than a full hearing, but in view of *Marcello* v. *Bonds* 349 U.S. 302 (1955) and 8 U.S.C. 1252(b), and in light of the full hearing before the Board of Immigration Appeals we cannot hold that due process was denied.

With considerable reluctance we are forced to conclude that summary judgment be granted defendant.

Counsel for defendant will prepare an order consistent with this finding.

(S.) LUTHER W. YOUNGDAHL,
Judge.

January 30, 1956.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13242

HENRIK MANNERFRID, Appellant

v.

HERBERT BROWNELL, JR., Attorney General of the United States, Appellee

Appeal from the United States District Court for the District of Columbia

Decided October 18, 1956

Mr. George Spiegelberg, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Messrs. Jack Wasserman* and *Ralph Becker* were on the brief, for appellant. *Mr. David Carliner* also entered an appearance for appellant.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney,

and *Messrs. Lewis Carroll* and *Joseph M. F. Ryan, Jr.*, Assistant United States Attorneys, were on the brief, for appellee. *Mrs. Lorraine Wall Hurney*, Attorney, Office of General Counsel, Immigration and Naturalization Service, also was on the brief for appellee.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant Mannerfrid instituted in the District Court a civil action for declaratory judgment [1] and for injunctive and other relief. He alleged that the defendant Attorney General of the United States was about to deport him. In brief the facts developed in the complaint and answer were that Mannerfrid entered the United States in 1941 and obtained successive extensions of time to remain here until he was admitted as a permanent resident in April, 1949. Thereafter on approximately thirteen occasions he received reentry permits and reentered the United States under such permits. Meantime, in March, 1943, he executed and filed a form known as DSS Form 301, which is an application by an alien for relief from military service.

In 1951 Mannerfrid applied for naturalization. The District Court for the Southern District of New York denied the application because Mannerfrid had filed DSS Form 301.[2] The applicable statute provided that an alien might claim exemption from military service "but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States".[3] The Court of Appeals for the Second Circuit affirmed the District Court.[4]

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[1] Declaratory Judgments Act, 62 STAT. 964 (1948), as amended, 68 STAT. 890 (1954), 28 U.S.C. § 2201.

[2] Application of Mannerfrid, 101 F.Supp. 446 (1951).

[3] Sec. 3(a), Selective Training and Service Act of 1940, 54 STAT. 885, as amended by the Act of Dec. 20, 1941, 55 STAT. 845.

[4] Mannerfrid v. United States, 200 F.2d 730 (1952), *cert. denied*, 345 U.S. 918, 97 L.Ed. 1351, 73 S.Ct. 729 (1953).

A provision of the Immigraiton and Nationality Act[5] reads as follows:

> "(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> "* * *."

The Immigration Act of 1924 provided: "No alien ineligible to citizenship shall be admitted to the United States * * * [with immaterial exceptions.]"[6] And the same Act, as amended in 1945, provided:[7]

> "The term 'ineligible to citizenship', when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3(a) of the Selective Training and Service Act of 1940, as amended * * *."

The Attorney General contends that under the foregoing statutory provisions Mannerfrid was, by final decision of the Court of Appeals, debarred from becoming a citizen under Section 3(a) of the Selective Service Act; that he therefore could not be lawfully admitted to the United States; that therefore he was excludable at the time of his entry; and, finally, that therefore he must be deported.

Mannerfrid says that in 1948 he presented to the Attorney General an application for pre-examination; that the Attorney General found that he was not ineligible for citizenship or admission to permanent residence; and that he thereafter went to Canada and returned with a visa as a permanent resident. He says that both the District Court in New York and the Court of Appeals for the Second Circuit recited, and thus found, that he was lawfully admitted

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[5] Sec. 241(a)(1), 66 STAT. 204 (1952), 8 U.S.C.A. § 1251(a)(1).

[6] Sec. 13(c), 43 STAT. 162.

[7] Sec. 28(c), 43 STAT. 168, as amended by the Act of Oct. 29, 1945, 59 STAT. 551.

into the United States for permanent residence in 1949. His argument is that the determination of the Attorney General, never having been reversed or modified, is binding upon the Immigration and Naturalization Service; that the courts' findings are *res judicata;* and that the Government is estopped on equitable principles from deporting him by the Attorney General's ruling.

District Judge Youngdahl wrote a concise and complete memorandum opinion and granted the Attorney General's motion for summary judgment.[8] We agree with his discussion and think nothing need be added to it. Upon that basis the judgment must be and is

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1956

C.A. 4258-54

No. 13,242

HENRIK MANNERFRID, Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, Appellee

Appeal from the United States District Court for the District of Columbia

Before: Prettyman, Bazelon and Danaher, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

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[8] — F.Supp. —.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: October 18, 1956.

Per Circuit Judge Prettyman.

(2978-5)